

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHARLOTTE R. KELLER,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of the
Social Security Administration,

Defendant.

CASE NO. 10cv5305BHS

REPORT AND RECOMMENDATION

Noted for May 6, 2011

This matter has been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR 4(a)(4), and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261, 271-72 (1976). This matter has been fully briefed. (See ECF Nos. 17, 18, 21.)

After considering and reviewing the record, the undersigned finds that the ALJ did not evaluate properly the medical evidence or plaintiff's testimony. Therefore, the undersigned recommends that this case be REVERSED and REMANDED.

BACKGROUND

Plaintiff was born on April 15, 1955 (Tr. 51). She has experience working as a caregiver for a disabled woman (Tr. 602-03), as well as for developmentally disabled youths, until 1995 (Tr. 603). When her work as a caregiver became “difficult for [her] to deal with,” (Tr. 603), she felt suicidal, stopped working, and her father began to support her (Tr. 605). Subsequently, in 1998, plaintiff tried to go back to work. However, “the anxiety [] was crippling [her],” and she “just couldn’t do it” (Tr. 607).

Plaintiff testified at her September 1, 2004 hearing that “it’s very hard to be motivated when there isn’t really anything in life that I want” (Tr. 463). She also testified that “if I worked at home and I had very little contact with clients, just strictly about the business that we were doing, that I would – I could probably do it” (Tr. 451). However, due to her depression, and feeling like she doesn’t “want to be alive,” she has “a very hard time motivating [her]self to do stuff” (Tr. 462).

PROCEDURAL HISTORY

On November 25, 2002, plaintiff filed an application for Social Security Disability benefits (Tr. 51-53, 483), alleging a disability onset date of April 15, 1996 (Tr. 51). Her application was denied on October 8, 2004 by Administrative Law Judge Ralph Jones (hereinafter “ALJ Jones”) (Tr. 12-22), after a September 1, 2004 hearing (see Tr. 433-73). Plaintiff filed a new application for Social Security Income in November, 2005, and also appealed the October 8, 2004 decision by ALJ Jones.

Plaintiff’s appeal of the October 8, 2004 decision by ALJ Jones was successful, and this matter was remanded by the district court on April 10, 2006 (see Tr. 483). Administrative Law Judge Dan P. Hyatt (hereinafter “ALJ Hyatt” or “the ALJ”) held a remand hearing on May 17,

1 2007 (see Tr. 595-615) and issued an unfavorable decision on July 9, 2007 (see Tr. 483-94).

2 Again, plaintiff appealed.

3 On December 3, 2008, this matter was remanded for a second time, this time by the Ninth
4 Circuit (Tr. 638; see also Tr. 634-36). Also, in the meantime, plaintiff was successful in her
5 subsequent application for Social Security Income on the basis of personality disorder and
6 anxiety disorder, with an onset date of November, 2005 (Tr. 483, 773-74).
7

8 On May 26, 2009, after this matter was remanded by the Ninth Circuit, the Appeals
9 Council issued an order remanding the case to the ALJ for a hearing (Tr. 641-44). On November
10 20, 2009, ALJ Hyatt presided over Plaintiff's hearing (Tr. 771-88). On December 30, 2009, he
11 issued a written decision finding plaintiff "not under a disability" from the April 15, 1996 alleged
12 onset date, through December 31, 2001, the date last insured (Tr. 632). Plaintiff appealed this
13 decision by filing a complaint in the district court. The December 30, 2009 written decision by
14 ALJ Hyatt is the final decision of the Commissioner subject to judicial review regarding
15 plaintiff's alleged disability from the April 15, 1996 alleged onset date, through December 31,
16 2001. See 20 C.F.R. § 404.984(d).
17

18 Plaintiff contends that the ALJ erred by failing to consider properly all of plaintiff's
19 severe impairments and failing to consider properly all of plaintiff's functional limitations. (See
20 Plaintiff's Opening Brief, ECF No. 17, p. 3.) She also contends that the ALJ erred by failing to
21 find her disabled at step three of the sequential disability evaluation. (See id.) In the alternative,
22 plaintiff contends that the ALJ should have found plaintiff disabled at step five. (See id.) Among
23 other contentions, plaintiff provides eight specific arguments regarding this matter.
24

25 1. The ALJ failed to evaluate properly the medical evidence. (See id., at pp. 4-12.)
26

- 1 2. The ALJ failed to give appropriate weight to the opinions of plaintiff's vocational
2 counselor. (See id., at pp. 12-13.)
- 3 3. The ALJ failed to consider properly plaintiff's testimony regarding her symptoms and
4 limitations. (See id., at pp. 13-18.)
- 5 4. The ALJ erred by failing to consider properly all of plaintiff's severe impairments and
6 failing to consider properly all of plaintiff's functional limitations. (See id., at pp. 3-4.)
- 7 5. The ALJ failed to consider properly whether or not plaintiff met or equaled the B and C
8 criteria in Listings 12.04 and/or 12.06 and/or 12.08. (See id., at pp. 18-19.)
- 9 6. The ALJ improperly determined plaintiff's residual functional capacity. (See id., at pp.
10 19-21.)
- 11 7. The Commissioner erroneously found plaintiff capable of performing her past relevant
12 work. (See id., at p. 21.)
- 13 8. This case should be remanded for an award of benefits. (See id., at pp. 22-24.)

16 STANDARD OF REVIEW

17 Plaintiff bears the burden of proving disability within the meaning of the Social Security
18 Act (hereinafter "the Act"). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999) (*citing*
19 Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995)). The Act defines disability as the
20 "inability to engage in any substantial gainful activity" due to a physical or mental impairment
21 "which can be expected to result in death or which has lasted, or can be expected to last for a
22 continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).
23 Plaintiff is disabled under the Act only if plaintiff's impairments are of such severity that
24 plaintiff is unable to do previous work, and cannot, considering plaintiff's age, education, and
25 work experience, engage in any other substantial gainful activity existing in the national
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1 economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); see also Tackett v. Apfel, 180 F.3d 1094,
2 1098-99 (9th Cir. 1999).

3 Pursuant to 42 U.S.C. § 405(g), this court may set aside the Commissioner's denial of
4 social security benefits if the ALJ's findings are based on legal error or not supported by
5 substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th
6 Cir. 2005) (*citing* Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998)). “Substantial evidence” is
7 more than a scintilla, less than a preponderance, and is such ““relevant evidence as a reasonable
8 mind might accept as adequate to support a conclusion.”” Magallanes v. Bowen, 881 F.2d 747,
9 750 (9th Cir. 1989) (*quoting* Davis v. Heckler, 868 F.2d 323, 325-26 (9th Cir. 1989)); see
10 Richardson v. Perales, 402 U.S. 389, 401 (1971).

11 DISCUSSION

12
13 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
14 opinion of either a treating or examining physician or psychologist. Lester v. Chater, 81 F.3d
15 821, 830 (9th Cir. 1995) (*citing* Baxter v. Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991); Pitzer v.
16 Sullivan, 908 F.2d 502, 506 (9th Cir. 1990)); see also Edlund v. Massanari, 253 F.3d 1152, 1158-
17 59 (9th Cir. 2001) (“the ALJ erred in failing to meet, either explicitly or implicitly, the standard
18 of clear and convincing reasons required to reject an uncontradicted opinion of an examining
19 psychologist”) (*citing* Lester, supra, 81 F.3d at 830). Even if a treating or examining
20 psychologist’s or physician’s opinion is contradicted, that opinion “can only be rejected for
21 specific and legitimate reasons that are supported by substantial evidence in the record.” Lester,
22 supra, 81 F.3d at 830-31 (*citing* Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995)). In
23 addition, the ALJ must explain why his own interpretations, rather than those of the doctors, are
24 correct. Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998) (*citing* Embrey v. Bowen, 849 F.2d
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1 418, 421-22 (9th Cir. 1988)). However, the ALJ “need not discuss *all* evidence presented.”

2 Vincent on Behalf of Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (per curiam).

3 The ALJ must only explain why “significant probative evidence has been rejected.” Id. (*quoting*
4 Cotter v. Harris, 642 F.2d 700, 706-07 (3d Cir. 1981)).

- 5 1. The ALJ failed to evaluate properly the medical evidence provided by Dr. Robert E.
6 Schneider, Ph.D., examining psychologist, June 3, 2002

7
8 Dr. Robert E. Schneider, Ph.D. (hereinafter “Dr. Schneider”), examined plaintiff on June
9 3, 2002 (see Tr. 154-164). He conducted many objective tests including the “Wechsler Adult
10 Intelligence Scale-Revised (WAIS – R), Wide Range Achievement Test-Revised, Peabody
11 Individual Achievement Test-Reading Comprehension Subtest, Rey Auditory Verbal Learning
12 Test, and Minnesota Multiphasic Personality Inventory-2 (MMPI-2)” (Tr. 154-55). In his report,
13 Dr. Schneider discussed plaintiff’s background and subjective reports of her condition (Tr. 155-
14 58). Dr. Schneider also noted plaintiff’s clinical presentation, and assessed that “[d]epression has
15 become [plaintiff’s] identity” (Tr. 158). Dr. Schneider conducted a mental status evaluation
16 based on his objective observations, and noted that while plaintiff had a “depressive
17 presentation,” she did not exhibit “psychomotor retardation nor any interference in cognitive or
18 intellectual functions [that are] attributable to her depression” (id.).
19

20 In his report, Dr. Schneider then conducts a thorough discussion of plaintiff’s test results
21 and their implications (Tr. 158-61). He noted that some of plaintiff’s results on some tests that
22 are sensitive to the effects of depression resulted in little or no abnormal results (e.g., “no
23 interference with concentration or attention,” and “[s]he also performed well on the other tests
24 that are sensitive to problems with concentration and attention and are typically related to
25 depression and anxiety”) (Tr. 159). Regarding plaintiff’s insight into her abilities, Dr. Schneider
26

1 noted that “she did score within the high average range, but she did not score in the superior
2 range that she implied and that she believes” (id.). He also noted that “it appears that she could
3 perform basic assembly and production work if she were interested” (Tr. 160). Dr. Schneider
4 also noted that plaintiff “presents as being hypersensitive to other people’s behavior” (id.).
5

6 Dr. Schneider also evaluated plaintiff’s test results from the Minnesota Multiphasic
7 Personality Inventory-2 (the MMPI-2) (Tr. 161). In contrast with the findings on her cognitive
8 tests, the profile resulting from the MMPI-2 was “consistent with self-report,” and “indicates
9 chronic depression, anxiety and diminished psychological energy in an individual with a passive
10 aggressive and passive dependent personality disorder” (id.). Dr. Schneider noted that “[t]his
11 particular profile is one of the most frequent profile types seen among psychiatric patients and it
12 is rarely found among normal [individual]s” (id.). He also noted that the psychopathology
13 indicated by plaintiff’s test results “typically involved multiple neurotic manifestations and it is
14 typically chronic and long standing” (id.). At the end of his report, Dr. Schneider concluded that
15 plaintiff’s MMPI-2 profile “is consistent with her descriptions of her functioning” (Tr. 163). Dr.
16 Schneider also concluded that “[i]ndividuals with similar [MMPI-2] profiles typically exhibit
17 many of the same characteristics that [plaintiff] describes including chronic distress, chronic
18 rumination, social isolation and withdrawal and poor emotional coping skills” (Tr. 163).
19

20 Dr. Schneider included approximately three pages of summary and conclusions (Tr. 161-
21 64). He concluded that plaintiff “presented with an extreme disability identity. She is convinced
22 that she cannot work outside of her house and cannot work with other people” (Tr. 162). Dr.
23 Schneider noted that “individuals with similar profiles are not good candidates for introspective
24 psychological treatment, but they benefit from supportive, directive and goal oriented treatment
25 that emphasizes real life accomplishments” (Tr. 163). He also opined that such treatment “would
26

1 be an excellent match for [plaintiff's] current situation in which real life accomplishments will be
2 essential to her returning to the work force" (id.).

3 Dr. Schneider concluded that plaintiff's "character disorder is quite significant and is
4 likely to be the most significant barrier to vocational planning and vocational success" (Tr. 163).
5 Dr. Schnieder opines further that plaintiff's character disorder manifests as a belief by plaintiff
6 that she cannot work (id.). According to Dr. Schneider, plaintiff "is so convinced that she cannot
7 work outside of the house that it seems virtually impossible that she would even attempt to work
8 outside of the house" (id.). Therefore, Dr. Schneider concludes that "it may be necessary to
9 identify some activity that she can perform at home" (id.). Dr. Schneider diagnosed plaintiff with
10 major depression, chronic; generalized anxiety disorder; mixed personality disorder with passive
11 aggressive, passive dependent and schizoid features," among other diagnoses (Tr. 164).
12

13 Although the ALJ does not specify what weight he gave to the opinion by Dr. Schneider,
14 the ALJ concluded that "Dr. Schneider's opinions . . . cannot be afforded significant weight"
15 (Tr. 628). The ALJ discounted Dr. Schneider's opinion, in part, because the ALJ concluded that
16 "Dr. Schneider apparently relied quite heavily on [plaintiff]'s subjective report of symptoms and
17 limitations in formulating an opinion that appears to rest in significant part on an assessment of
18 physical limitations clearly outside his area of expertise" (id.).
19

20 Regarding reliance on plaintiff's subjective reports, as noted above, Dr. Schneider
21 conducted many psychological and cognitive tests, including the "Wechsler Adult Intelligence
22 Scale-Revised (WAIS – R), Wide Range Achievement Test-Revised, Peabody Individual
23 Achievement Test-Reading Comprehension Subtest, Rey Auditory Verbal Learning Test, and
24 Minnesota Multiphasic Personality Inventory-2 (MMPI-2)" (see supra p. 6; see also Tr. 154-55).
25 Dr. Schneider provided an extensive analysis of these objective tests (see supra pp. 6-7; Tr. 158-
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1 161). Based on these facts, and on a review of the relevant record, the ALJ's conclusion that "Dr.
2 Schneider apparently relied quite heavily on [plaintiff]'s subjective report of symptoms and
3 limitations in formulating an opinion," is not an accurate assessment, and is a finding without
4 substantial evidence in the record (see Tr. 628).

5
6 In addition, the Court concludes that a review of Dr. Schneider's report reveals that Dr.
7 Schneider appears to have based his opinion on his assessment of plaintiff's subjective reports,
8 his objective observations and the results of plaintiff's psychological and cognitive test results.
9 There is only a small amount of discussion of physical limitations in Dr. Schneider's report and
10 his conclusions contain almost no references to plaintiff's physical complaints (see Tr. 161-64).
11 Therefore, the ALJ's conclusion that Dr. Schneider's opinion "appears to rest in significant part
12 on an assessment of physical limitations clearly outside his area of expertise" does not have
13 substantial support in the record (id.).

14
15 Likewise, the ALJ discounted Dr. Schneider's opinion in part because "he ignored the
16 objective evidence from his own testing," citing evidence of plaintiff's cognitive abilities (Tr.
17 628). The Court has noted multiple times within Dr. Schneider's report that Dr. Schneider noted
18 that plaintiff demonstrated normal abilities on cognitive tests and on objective tests that often are
19 sensitive to depression and anxiety (e.g., "[s]he also performed well on the other tests that are
20 sensitive to problems with concentration and attention and are typically related to depression and
21 anxiety") (Tr. 159; see supra pp. 6-7). There is no evidence that Dr. Schnieder "ignored" any of
22 this objective evidence, and there is much evidence in his report demonstrating that he
23 considered it repeatedly (see Tr. 159, 160, 162, 163).

24
25 In the context of evaluating the medical opinion by Dr. Schneider, the ALJ also made his
26 own conclusion as to the meaning of the medical evidence in Dr. Schneider's report: "the

1 objective evidence from [Dr. Schneider's] testing [] reflected that [plaintiff] was psychologically
2 capable of performing the basic demands of competitive, remunerative, skilled work on a
3 sustained basis" (Tr. 628). However, Dr. Schneider reviewed this same objective evidence and
4 came to a contrary conclusion. Although Dr. Schneider noted that plaintiff's concentration ability
5 and ability to maintain attention demonstrated that plaintiff *cognitively* was capable of
6 performing the basic demands of work, he never concluded that this objective evidence
7 demonstrated that she *psychologically* was capable of performing the basic demands of work. In
8 fact, Dr. Schneider made what is almost the exact opposite conclusion: "[Plaintiff's] character
9 disorder is quite significant and is likely to be the most significant barrier to" plaintiff's
10 vocational success (Tr. 163). The ALJ must explain why his own interpretations, rather than
11 those of the doctors, are correct. Reddick, *supra*, 157 F.3d at 831. Here, the ALJ did not explain
12 adequately why his interpretation of the objective evidence in Dr. Schneider's report is correct
13 over the interpretation of the same objective evidence by Dr. Schneider.
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15
16 Finally, based on a review of Dr. Schneider's report, and based on the reasons already
17 discussed, the Court concludes that the ALJ's finding that Dr. Schneider "seemed to uncritically
18 accept as true, most, if not all, of what [plaintiff] reported despite his own observations
19 concerning how [plaintiff] exaggerated her physical and emotional disabilities" is not supported
20 by substantial evidence in the record.
21

22 Even if an examining psychologist's opinion is contradicted, that opinion "can only be
23 rejected for specific and legitimate reasons that are supported by substantial evidence in the
24 record." Lester, *supra*, 81 F.3d at 830-31. Because the ALJ did not provide legitimate reasons
25 supported by substantial evidence in the record for his failure to give significant weight to the
26 opinion by Dr. Schneider, and because the ALJ did not explain why his interpretations over those

1 of Dr. Schneider are correct, the Court concludes that the ALJ did not evaluate properly the
 2 medical evidence supplied by Dr. Schneider.

3 2. The ALJ improperly rejected the evidence provided by Ms. Susan Kelsey, M.S., C.R.C.,
 4 Vocational Counselor.

5 Ms. Susan Kelsey, M.S., C.R.C., (hereinafter “Ms. Kelsey”), is a “Rehabilitation
 6 Technician 2 for the State of Washington in the Division of Vocational Rehabilitation” (Tr. 573-
 7 74). She “worked extensively with [plaintiff] to try and help her become employed” (*id.*). On
 8 June 1, 2006, Ms. Kelsey wrote a letter to the ALJ, stating that the Division of Vocational
 9 Rehabilitation “worked very hard to find suitable employment or a self employment business for
 10 [plaintiff] without success due to the many disabilities that she has” (*id.*). Ms. Kelsey also
 11 indicated her opinion that plaintiff “is creative with ideas, but has extreme difficulty executing
 12 her ideas due to her inability to be able to work outside the home or interact with people” (*id.*).
 13 The ALJ failed to mention this evidence by vocational counselor Ms. Kelsey. Ms. Kelsey
 14 provided significant probative evidence regarding plaintiff’s ability to work. According to the
 15 Ninth Circuit Court of Appeals, when an ALJ rejects significant probative evidence, the ALJ
 16 must explain why this “significant probative evidence has been rejected.” Vincent on Behalf of
 17 Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (per curiam) (*quoting Cotter v.*
 18 *Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981)).

19 3. The ALJ erred in assessing Plaintiff’s Credibility.

20 If the medical evidence in the record is not conclusive, sole responsibility for resolving
 21 conflicting testimony and questions of credibility lies with the ALJ. Sample v. Schweiker, 694
 22 F.2d 639, 642 (9th Cir. 1999) (*quoting Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir. 1971)
 23 (*citing Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980))). Nevertheless, the ALJ’s
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credibility determinations “must be supported by specific, cogent reasons.” Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998) (*citing* Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)). If an ALJ discredits a claimant's subjective symptom testimony, the ALJ must articulate specific reasons for doing so. Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006). In evaluating a claimant's credibility, the ALJ cannot rely on general findings, but ““must specifically identify what testimony is credible and what evidence undermines the claimant's complaints.”” Id. at 972 (*quoting* Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999)); Reddick, 157 F.3d at 722 (citations omitted); Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) (citations omitted). The ALJ may consider “ordinary techniques of credibility evaluation,” including the claimant's reputation for truthfulness, inconsistencies in testimony, daily activities, and “unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment.” Smolen, *supra*, 80 F.3d at 1284.

The determination of whether to accept a claimant's testimony regarding subjective symptoms requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; Smolen, 80 F.3d at 1281 (*citing* Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)). First, the ALJ must determine whether there is a medically determinable impairment that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); Smolen, 80 F.3d at 1281-82. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms “based solely on a lack of objective medical evidence to fully corroborate the alleged severity of pain.” Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991) (*en banc*) (*citing* Cotton, 799 F.2d at 1407). Absent affirmative evidence that the claimant is malingering, the ALJ must provide “clear and convincing” reasons for rejecting the claimant's testimony. Smolen, 80 F.3d at 1283-84;

1 Reddick, 157 F.3d at 722 (*citing* Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996); Swenson v.
2 Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

3 The ALJ conducted an extensive review of plaintiff's credibility (Tr. 625-628). Some of
4 this discussion is relevant and considered properly in the context of a claimant's credibility. See
5 Smolen, supra, 80 F.3d at 1284. For example, the ALJ noted that plaintiff "admitted that she
6 believed she could work if she chose to, as long as she did not have to be around other people"
7 (Tr. 450, 625), and also noted plaintiff's "admitted boredom' and 'lack of motivation,'
8 [as well as her belief] that she could work if she found a job that 'interested her'" (Tr. 451, 627;
9 see also Tr. 461, 462, 463). However, the ALJ also improperly relied on erroneous facts and
10 general, vague statements.
11

12 The ALJ included in his discussion regarding plaintiff's credibility that "a review of
13 [plaintiff]'s work history shows that she worked only sporadically for several years prior to the
14 alleged disability onset date" (Tr. 627). The ALJ concluded that this finding "raises a question as
15 to whether [plaintiff]'s continuing unemployment is actually due to medical impairment" (id.).
16 However, plaintiff's work history includes four quarters of earnings every year from 1978 until
17 1996 (Tr. 663). In the context of an application for disability, the fact that plaintiff worked four
18 quarters every year from 1978 until 1996 weighs in favor of a positive finding regarding
19 plaintiff's credibility. The ALJ's finding that plaintiff "worked only sporadically for several
20 years" prior to April 15, 1996, the alleged onset date, was relied on improperly by the ALJ in
21 making his credibility finding.
22

23 Regarding plaintiff's credibility, the ALJ also found that:
24

25 while [plaintiff] does have underlying medical conditions that could reasonably
26 result in the symptoms she alleges if she failed to follow her medical regimen
 or attempted to exceed her residual functional capacity as set forth above . . .
 . her allegations as to the intensity, persistence and limiting effects of these

1 symptoms are disproportionate and not sufficiently supported by the objective
2 medical findings or any other corroborating evidence.

3 (Tr. 626). Based on a review of the record, the Court finds that the ALJ's assertion that plaintiff
4 only suffered the symptoms she alleges if she failed to follow her medical regimen or attempted
5 to exceed her residual functional capacity is not supported by substantial evidence in the record
6 as a whole. First, the Court notes that the ALJ does not cite any medical opinion to support this
7 conclusion. In addition, plaintiff's testimony demonstrates that she suffered the symptoms she
8 alleges even when she was not attempting to exceed the residual functional capacity the ALJ
9 concluded that she had. The ALJ subsequently adopted the opinion from the vocational expert
10 who testified at plaintiff's last hearing that plaintiff's residual functional capacity is such that she
11 is capable of her previous work as a home care attendant (Tr. 631-32). However, plaintiff alleges
12 that even working in the home as a caregiver was "difficult for [her] to deal with" and resulted in
13 suicidal feelings (Tr. 603).

14
15 Similarly, regarding "objective medical findings or any other corroborating evidence,"
16 Dr. Schneider noted the objective medical finding that the profile for plaintiff resulting from the
17 objective results of her MMPI-2 test was "consistent with self-report" (Tr. 161). Dr. Schneider
18 also noted that "[t]his particular profile is one of the most frequent profile types seen among
19 psychiatric patients and it is rarely found among normal [individual]s" (*id.*). Therefore, based on
20 these facts, and on a review of the relevant record, the Court also concludes that the ALJ's
21 assertion that plaintiff's allegations "are disproportionate and not sufficiently supported by the
22 objective medical findings or any other corroborating evidence" is not supported by substantial
23 evidence in the record.
24

25
26 Next, the ALJ concludes that plaintiff's treatment "was generally successful in
controlling [plaintiff's allegedly disabling] symptoms" (Tr. 626). The ALJ does not provide any

1 citation to a medical opinion or to any other source for this conclusion. When an ALJ bases a
2 credibility finding on the medical determination that an individual's treatment regimen is
3 successful in treating the individual's symptoms, "absent affirmative evidence that [plaintiff] is
4 malingering, the ALJ must provide 'clear and convincing' reasons for rejecting the claimant's
5 testimony. Smolen, supra, 80 F.3d at 1283-84. Based on a review of the record, the Court
6 concludes that the ALJ did not provide "clear and convincing" reasons for rejecting this aspect
7 of plaintiff's testimony. See id.

9 The ALJ also concludes that because plaintiff "often failed to comply with the medical
10 regimen prescribed by her treating doctors . . . her symptoms may not have been as serious as
11 has been alleged" (Tr. 626). However, when a mental illness is involved, assuming that a failure
12 to comply with prescribed treatment suggests a *willful* failure to comply with prescribed
13 treatment can be illogical. This is in part because a person suffering from a mental illness may
14 not realize that she needs her medication, or she may not even realize that her "condition reflects
15 a potentially serious mental illness." Van Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir.
16 1996). "[I]t is a questionable practice to chastise one with a mental impairment for the exercise
17 of poor judgment in seeking rehabilitation." Id. (*quoting* with approval, Blankenship v. Bowen,
18 874 F.2d 1116, 1124 (6th Cir. 1989)).

20 In addition, according to Social Security Ruling, (hereinafter "SSR"), SSR 96-7, "the
21 adjudicator must not draw any inferences about an individual's symptoms and their functional
22 effects from a failure to seek or pursue regular medical treatment without first considering any
23 explanations that the individual may provide, or other information in the case record, that may
24 explain infrequent or irregular medical visits or failure to seek medical treatment." SSR 96-7,
25 1996 SSR LEXIS 4, at *21-*22. Here, the ALJ includes the following in his decision:
26

[Plaintiff] has also written that she was unable to seek treatment and/or obtain medication because of a lack of funds and/or health insurance coverage (internal citation to Exhibit 16E). In this case, one might expect to see records of visits to the emergency room or to the free or low-cost health clinics that exist in the area and of attempts to use one of the many programs to provide prescription medications to persons of limited means. To the extent [plaintiff] refused or failed to take advantage of these alternative treatment sources it is not unreasonable to suggest that her symptoms may not have been as serious [as] she has alleged.

(Tr. 627).

The ALJ does not specify which of “the many programs” or which of the “free or low-cost health clinics” the ALJ expected plaintiff to have utilized. In addition, the ALJ does not provide any citation to the record suggesting that plaintiff was aware of any such possibilities or that seeking treatment at one of these clinics or through one of these programs was a viable option for plaintiff. Nevertheless, the ALJ appears to suggest that plaintiff’s symptoms are less serious than plaintiff alleges because otherwise, she would have sought treatment through one of the “many programs” or at the “free or low-cost health clinics” (Tr. 627).

As “it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation,” the Court concludes that the reasons given by the ALJ for his suggestion that plaintiff’s symptoms “may not have been as serious [as] she has alleged” are not convincing. Van Nguyen, *supra*, 100 F.3d at 1465 (*quoting* with approval, Blankenship, 874 F.2d at 1124); *see also* Smolen, *supra*, 80 F.3d at 1283-84.

Finally, the ALJ indicated that three “factors weigh against considering [plaintiff]’s allegations [regarding her limitations in daily activities] to be strong evidence in favor of finding [plaintiff] disabled” (Tr. 627). According to the ALJ,

[f]irst, allegedly limited daily activities cannot be objectively verified with any reasonable degree of certainty. Secondly, even if [plaintiff]’s daily activities are truly as limited as alleged, it is difficult to attribute that degree of limitation to [plaintiff]’s medical condition, as opposed to other reasons, in view of the

1 relatively weak medical evidence and other factors discussed in this decision.
2 Finally, the record reflects that [plaintiff] has engaged in daily activities that
3 are not limited to the extent one would expect, given the complaints of disabling
4 symptoms and limitation.

(Tr. 627).

5 The first reason regarding daily activities given by the ALJ in support of her conclusion
6 that “[plaintiff’s] subjective complaints cannot be found sufficiently credible to serve as additive
7 evidence to support a finding of disability” (Tr. 627-28) was that “allegedly limited daily
8 activities cannot be objectively verified with any reasonable degree of certainty” (Tr. 627). This
9 is a statement of general fact that bears only a small amount of relevance to plaintiff’s credibility
10 in this specific case: simply because a fact cannot be verified objectively provides little evidence
11 to support the conclusion that the individual is not being truthful about such fact in any particular
12 instance.
13

14 The second reason given by the ALJ is that “it is difficult to attribute that degree of
15 limitation to [plaintiff]’s medical condition, as opposed to other reasons, in view of the relatively
16 weak medical evidence and other factors discussed in this decision.” (*Id.*) First, the Court notes
17 that the ALJ does not specify what “other reasons” to which one can attribute the degree of
18 limitation plaintiff alleges that she suffers. Attributing the degree of limitation plaintiff alleges to
19 “other reasons,” when those “other reasons” are not specified, provides no support for the ALJ’s
20 adverse credibility finding. The ALJ also supports his conclusion regarding plaintiff’s credibility
21 determination with his characterization of the medical evidence as “relatively weak” (Tr. 627).
22 The Court already has determined that the ALJ did not evaluate properly the medical evidence.
23 See supra section 1. Therefore, this improper evaluation of the medical evidence cannot support
24 an adverse credibility finding.
25
26

1 Finally, the ALJ supports his credibility determination regarding daily activities with the
2 conclusion that “the record reflects that [plaintiff] has engaged in daily activities that are not
3 limited to the extent one would expect, given the complaints of disabling symptoms and
4 limitation” (Tr. 627). In support of this conclusion, the ALJ cites examples of plaintiff’s physical
5 abilities (“she can care for herself without assistance, prepare simple meals, perform light
6 housework, shop for groceries and household items in stores and online, and drive an
7 automobile”) (*id.*). The ALJ also relies for this conclusion on the fact that plaintiff “has worked
8 extensively with a vocational rehabilitation counselor since August 2003,” and that she
9 “prepared ‘an incredibly detailed business plan’” (*id.*). First, the ALJ fails to mention that
10 plaintiff was unsuccessful in implementing her “‘incredibly detailed business plan,’” because
11 “her primary barrier persists in being unable to interact with people to the extent needed to
12 succeed with her business” (Tr. 428). The ALJ also fails to mention that plaintiff’s vocational
13 rehabilitation counselor concluded that “[a]s her vocational counselor, I am concerned that her
14 ability to work competitively is extremely limited” (*id.*). The Court also notes that according to
15 the Ninth Circuit Court of Appeals, “[i]t does not follow from the fact that a claimant tried to
16 work for a short period of time and, because of h[er] impairments, *failed*, that [s]he did not then
17 experience [symptoms] and limitations severe enough to preclude h[er] from *maintaining*
18 substantial gainful employment.” Lingenfelter v. Astrue, 504 F.3d 1028, 1038 (9th Cir. 2007)
19 (emphases in original).

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23 In addition, none of the daily activities listed by the ALJ demonstrate that plaintiff can
24 interact appropriately with others in a work environment outside of her home, and none of these
25 daily activities negate plaintiff’s alleged symptoms and limitations due to her major depression,
26 anxiety and personality disorder. “[A]bsent affirmative evidence that [plaintiff] is malingering,

1 the ALJ must provide ‘clear and convincing’ reasons for rejecting the claimant's testimony.
 2 Smolen, supra, 80 F.3d at 1283-84. For all of the reasons discussed, and based on a review of the
 3 relevant record, the Court concludes that the ALJ here has failed to provide ‘clear and
 4 convincing’ reasons in support of his rejection of plaintiff’s testimony. See id.

- 5 4. The ALJ should reevaluate whether or not plaintiff’s sleep apnea and torn rotator cuff
 6 were severe impairments and should reevaluate all of plaintiff’s functional limitations.
 7

8 The Court already has determined that the ALJ failed to evaluate properly the medical
 9 evidence and plaintiff’s testimony. See supra sections 1 and 3. Following a proper review of the
 10 medical evidence and plaintiff’s testimony, the ALJ may make a different determination
 11 regarding whether or not plaintiff’s sleep apnea and torn rotator cuff were severe impairments,
 12 and regarding plaintiff’s functional limitations. Therefore, on remand, the ALJ should reevaluate
 13 this issue.
 14

- 15 5. The ALJ should reconsider whether or not plaintiff met or equaled the B and C criteria in
 16 Listings 12.04 and/or 12.06 and/or 12.08.

17 In making his determination that plaintiff’s “impairments or the combination of
 18 impairments do not meet or medically equal the criteria set forth for any impairment in the
 19 listings,” the ALJ concluded that plaintiff suffered only “moderate difficulties in maintaining
 20 social functioning” (Tr. 623). Dr. Schneider opined that individual with profiles similar to
 21 plaintiff’s “tend to withdraw and avoid social contact” (Tr. 161). Dr. Schneider’s opinion is
 22 consistent with a finding that plaintiff’s difficulties in maintaining social functioning are at a
 23 level of severity greater than moderate (see Tr. 154-64). In addition, the Court already has
 24 concluded that the ALJ’s evaluation of Dr. Schneider’s medical opinion was not proper. See
 25 supra section 1. Therefore, on remand, following a proper review of the medical evidence and of
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1 plaintiff's testimony, the ALJ may reach a different conclusion regarding this issue. For these
 2 reasons, if the ALJ reaches this step in the sequential disability evaluation, the ALJ should
 3 reconsider this issue.

4 6. The ALJ should reassess plaintiff's residual functional capacity.

5 Similarly, if the ALJ reaches this step in the sequential disability evaluation, the ALJ will
 6 need to reassess plaintiff's residual functional capacity following a proper evaluation of the
 7 medical evidence and of plaintiff's testimony.

8 7. The issue of whether or not plaintiff is capable of performing her past relevant work
 9 should be reevaluated.

10 As already discussed, see supra p. 13, the ALJ adopted the opinion from the vocational
 11 expert that plaintiff's residual functional capacity is such that she is capable of her previous work
 12 as a home care attendant (Tr. 631-32). However, plaintiff alleges that even working in the home
 13 as a home care attendant was "difficult for [her] to deal with" and resulted in suicidal feelings
 14 (Tr. 603). In addition, the Court already has determined that the ALJ conducted an improper
 15 evaluation of plaintiff's credibility and testimony. See supra section 3. Therefore, if the ALJ
 16 reaches this step in the sequential disability evaluation, the ALJ will need to reassess whether or
 17 not plaintiff is capable of performing her past relevant work, following a proper evaluation of the
 18 medical evidence and plaintiff's testimony.

19 8. This case should not be remanded for a direct award of benefits.

20 The Ninth Circuit has put forth a "test for determining when evidence should be
 21 credited and an immediate award of benefits directed." Harman v. Apfel, 211 F.3d 1172,
 22 1178 (9th Cir. 2000). It is appropriate where:

- 23 (1) the ALJ has failed to provide legally sufficient reasons for rejecting such
 24 evidence, (2) there are no outstanding issues that must be resolved before a
 25

1 determination of disability can be made, and (3) it is clear from the record
2 that the ALJ would be required to find the claimant disabled were such
evidence credited.

3 Harman, *supra*, 211 F.3d at 1178 (*quoting* Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir.1996)).

4 Here, outstanding issues must be resolved as the record contains contradictions.
5 Furthermore, for this reason, it is not clear from the record that the ALJ would be required to find
6 plaintiff disabled if the improperly rejected evidence was credited.
7

8 The ALJ is responsible for determining credibility and resolving ambiguities and
9 conflicts in the medical evidence. Reddick, *supra*, 157 F.3d at 722; Andrews, *supra*, 53 F.3d at
10 1043. If the medical evidence in the record is not conclusive, sole responsibility for resolving
11 conflicting testimony and questions of credibility lies with the ALJ. Sample v. Schweiker, 694
12 F.2d 639, 642 (9th Cir. 1999) (*quoting* Waters v. Gardner, 452 F.2d 855, 858 n.7 (9th Cir. 1971)
13 (*citing* Calhoun v. Bailar, 626 F.2d 145, 150 (9th Cir. 1980))).
14

15 Therefore, remand is appropriate to allow the Administration the opportunity to consider
16 properly the medical evidence, plaintiff's testimony and the record as a whole. Remanding the
17 matter will allow the Administration the opportunity to reconsider its decisions at steps two
18 through five of the sequential disability evaluation.
19

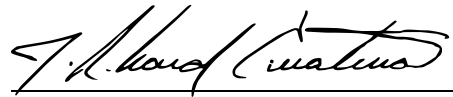
20 CONCLUSION

21 The ALJ failed to evaluate properly the medical evidence and plaintiff's testimony.
22 Therefore, this matter should be reversed and remanded. On remand, because of these errors, the
23 ALJ should begin the sequential disability evaluation at step two.
24

25 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
26 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.

1 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
2 review by the district judge. See 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
3 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on May 6, 2011,
4 as noted in the caption.

5 Dated this 12th day of April, 2011.

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10 J. Richard Creatura
11 United States Magistrate Judge
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